JP FINANCE (M) BERHAD

v.

TANSWAN BROTHERS ENTERPRISE SDN. BHD. & 3 ORS.

HIGH COURT, KUALA LUMPUR
DATO' V.C. GEORGE J.
[CIVIL SUIT NO. D23-2315-87]
3 SEPTEMBER 1993

PRACTICE & PROCEDURE: Review of taxation - Taxation of bill of defendant successfully opposing O. 14 application - Principles applicable.

The case before the Court was for the review of the learned Registrar's taxation of the 2nd defendant's bill of costs.

The plaintiff's claim against the 1st defendant was in respect of a term loan of RM600,000 interest and costs and against the other defendants a written guarantee given by them in respect of the repayment of the loan, interest, costs and other charges. The learned Senior Assistant Registrar (SAR) had given O. 14 judgment against the 2nd defendant but upon appeal the 2nd defendant was given unconditional leave to defend. One ground for allowing the appeal was that it being an on-demand guarantee, a condition precedent to suing was whether there had been a demand which, based on facts before the Court was a *bona fide* triable issue. The plaintiff sought to withdraw the action against the 2nd defendant (and 4th defendant) with liberty to re-file after a fresh demand was made. The SAR refused the application but allowed the 2nd defendant's appeal against the refusal. The action against the 2nd (and 4th defendant) was struck off and costs of the withdrawn action was ordered to be taxed and paid to the 2nd defendant before any new action against him was filed. The taxation pursuant to that order of costs was the subject of this review.

The review was in respect of "getting up" the O. 14 application before the SAR and "getting up" the appeal from the Registrar's decision. In respect of the former RM40,000 was billed and RM12,000 was allowed and maintained by the Registrar on review. RM25,000 was billed in respect of the latter and RM8,000 was allowed and maintained on review.

Held:

[1] Item 1(c) of Appendix 2 to O. 59 of the Rules of the High Court 1980 (RHC) provides that in a claim for a debt or liquidated demand in O. 14 proceedings the successful plaintiff is allowed a fixed basic cost of RM350. There is no similar provision for fixed costs to a defendant awarded the costs of an O. 14 application and accordingly the defendant is entitled to have his costs taxed. In respect of taxing a bill of a defendant who successfully opposes an O. 14 application, the taxing officer may look for guidelines from the view of the Rules Committee as expressed in Part I and II of Appendix 2 to O. 59 RHC and in O. 48 r. 28 of the Subordinate Courts Rules 1980 (SCR).

[2] Up to the O. 14 stage the responsibility of solicitors for the defendant can be said to be somewhat greater than that of the plaintiff's solicitors in that if the plaintiff fails, the matter has not come to an end whereas if the defendant fails it would result in a final judgment against him. No doubt some allowance has to be made for that. But apart from that, the opposing solicitors would have put in the same amount of effort and work. In the circumstances, in assessing the quantum of costs to be awarded to a successful defendant in an O. 14 application the fact that the Rules Committee have prescribed RM350 as fixed costs for a successful plaintiff cannot be ignored.

[3] The costs fixed for the successful plaintiff should not be regarded as providing a "ceiling" when costs are being taxed in favour of a successful defendant but the defendant should not be allowed anything significantly greater than that that would have been awarded to the plaintiff if he had been successful in the O. 14 application. For the taxing officer to allow anything substantially greater than the amount fixed for a successful plaintiff will be to make nonsense of the amount prescribed as fixed costs by the Rules Committee.

[4] Bearing in mind that a revision of the fixed costs and for that matter the whole of the prescribed scale of costs in the RHC is long overdue and although until such revision takes place the taxing officer is bound by the prescribed amounts, where in items in Appendix I the amount to be allowed is in the discretion of the taxing officer he is entitled to allow for the reduction of the value of money.

[5]It is O. 59 r. 31(1) RHC that provides that scale of costs contained in Appendix I "shall apply to the taxation of all costs incurred in relation to contentious business done..." A

qualification to that is O. 59 r. 31(4) which brings into play Appendix 2. The phrase "unless the Court otherwise orders" in sub-rule (4) provides an important proviso to the application of Appendix 2. It provides the Court with jurisdiction to take a case to which Appendix 2 normally applies out of the Appendix by ordering otherwise. *Inter alia* the Court may order that costs be taxed applying the scale of costs in Appendix I or the Court could invoke O. 59 r. 9(4) RHC and award a gross sum *in lieu* of taxed costs.

[6] Having in mind the comparatively small amount of RM350 allowed as fixed costs for a successful plaintiff in an O. 14 application, the Rules Committee must have had in mind the simplest of cases for the application of Appendix 2. This is borne out by the two other cases in respect of which Appendix 2 has application. Where the facts and/or the law is not simple and straightforward, it does not necessarily mean that O. 14 proceedings are not suitable and in that kind of case, if the plaintiff succeeds in obtaining final judgment Counsel should point out that the Court could and should direct that computation of costs be taken out of Appendix 2 and order that it be taxed using Appendix 1. Where the defendant succeeds, the taxing officer should not ignore the prescribed fixed costs in Appendix 2 but should also consider whether the Court would have taken the computation of costs out of Appendix 2 if the plaintiff had succeeded.

[7] In the simpler cases the successful defendant should not be awarded anything substantially more than the amounts prescribed by Appendix 2 for a successful plaintiff. In other cases it is important that the taxing officer makes a distinction between the getting up relevant to a trial and an O. 14 application. Order 48 r. 28 of the SCR recognises that costs where the action is disposed off summarily have to be significantly less than the amount that will be awarded after trial of the action by not providing costs for advocacy where the plaintiff enters judgment under O. 26A SCR. Applying O. 48 r. 28 to an action for RM100,000 in the Subordinate Courts where the plaintiff obtains summary judgment, he would be entitled to RM1,375 as opposed to RM6,825 costs after trial. This works out to the plaintiff getting about 20% of the costs after a full trial which provides something firm on which the taxing officer may hang onto in taxing costs in respect of O. 14 proceedings.

[8] The law in respect of the two points raised in the instant case is run of the mill and have been discussed in any number of reported judgments of the Malaysian Courts. If the plaintiff had succeeded in the O. 14 application and sought for costs to be taxed on the ground that fixed costs would be inadequate, he would have succeeded largely because the prescribed amounts have not been revised since June 1980 and the Court should not ignore that the value of money has fallen since 1980. Thus, to allow anything more than RM2,000 for "getting up" is to completely lose sight of what the Rules Committee has prescribed as its opinion of adequate costs. For the appeal from the SAR's decision on the O. 14, while there will be duplication of "getting up" the solicitors will have to refresh their minds on the issues and the law and will also have to look at it from a somewhat different perspective from that of presenting the case to a Court of first instance. This Court would have allowed RM1,500 as "getting up" for the appeal. The learned Registrar does not appear to have made a distinction between the O. 14 stage and the trial stage. In any event the amount he has allowed is so obviously wrong that this Court has to interfere with his decision.

Obiter:

In *Canopee Investment Pte Ltd & Ors. v. Landmarks Holdings Bhd & Ors.* [1990] 1 MLJ 292 this Court had suggested that taxing officers could get some guidance from the Rules Committee's views on the quantum to be awarded. Some qualifications should have been made (and were not). Firstly, there should be a significant tapering of the rate by which the costs are increased as the value of the subject matter of the claim gets higher. The rate would vary from case to case. At the low end would be the running down and simple goods sold and delivered type of cases and at the other end the complicated cases. This Court would suggest in the simpler cases, applying the Subordinate Courts Rules scale, where the value of the claim is from, say RM100,001 to RM150,000 the rate of increase should be reduced from RM125 per RM1,000 to say RM60 per RM1,000 and from RM150,001 to say RM1 million the rate should not be more than about RM20 per RM1,000 and thereafter the rate should be reduced to a nominal, say, RM5 to RM10 per RM1,000. In a claim for RM1 million in a simple case where the trial had lasted 2 or 3 days and where the taxing

party is entitled to "getting up" for the trial of the action, the total costs including "getting up" but excluding out of pockets, should not be more than, say, about RM27,000. Secondly, the scale of costs set out in the Subordinate Courts Rules are to meet the whole of the costs excluding out of pockets. Accordingly in arriving at the amount to be allowed for the item "getting up" alone there should be an adjustment made on the prescribed amount. Finally, there should be a further downward adjustment of the amount to be allowed if the "getting up" involved is not for full trial. The amount for "getting up" for O. 14 or other interlocutory applications should normally be significantly less than that for a full trial. The rates and figures suggested here are not necessarily those that the taxing officer should use or apply. They are set out here to illustrate and to point the direction the taxing officer could take in approaching the taxation of a bill of costs. This Court expresses the hope that if and when *Canopee* is cited reference to these qualifications will not be overlooked.

[In respect of No. 28, page 4 of bill of costs, item 26, Appendix 1 to O. 59, taxed off RM10,000 to allow RM2,000 and in respect of No. 58, page 7 of the bill of costs, item 27, Appendix 2, taxed off RM6,500 to allow RM1,500. The allocatur of SAR to be amended accordingly. Costs of review fixed at RM250 to include inter alia costs for drawing objections to decisions of Registrar, for drawing, issuing and filing of service of summons, to attend before Judge for review, attending at hearing of review and "getting up" the objections for review].

Cases referred to:

Chop Yoon Kee Heng v. North Union Insurance Co. Ltd. [1932] MLJ 67 ***(refd)***

State of Selangor v. Kepong Dredging Co. Ltd. [1932] 1 MLJ 181 ***(refd)***

Lee Bang v. Nadzri [1965] 2 MLJ 186 ***(refd)***

Starlite Ceramic Industry Ltd. v. Hiap Huat Pottery [1973] 1 MLJ 146 at 149 ***(refd)***

Lloyds Bank plc v. Ang Cheng Ho Quarry & Ors. [1993] 1 MLJ 127 ***(refd)***

Poh Sum Huat v. Malaysian Banking Ltd. [1983] 2 MLJ clxxv. ***(refd)***

Canopee Investment Pte Ltd. & Ors. v. Landmarks Holdings Bhd. & Ors. [1990] 1 MLJ 292 ***(refd)***

Supreme Finance (M) Sdn. Bhd. v. Bukit Barat Development Sdn. Bhd. [1991] 2 CLJ 1394 ***(refd)***

Cow v. Casey [1949] 1 KB 481 ***(cit)***

European Asian Bank v. Punjab & Sind Bank [1983] 2 All ER 508 ***(cit)***

Malayan Insurance (M) Sdn. Bhd. v. Asia Hotel Sdn. Bhd. [1987] 2 MLJ 183 ***(cit)***

Legislation referred to:

Rules of the High Court 1980, O. 14, O. 18 r. 19, O. 59 rr. 9(4), 31(1), (4) Parts I & II of Appendix 1 & 2

Subordinate Courts Rules, O. 48 r. 28

Other sources referred to:

Mallal's Supreme Court Practice, 2nd Edn., pp. 763 and 764

For the plaintiff - Rita Phuah; M/s Soo Thien Ming & Shahrizat

For the 2nd defendant - Wu Tern Yue; M/s K. C. Yap Kamaludin & Partners

JUDGMENT

V.C. George J:

This is a summons to the Judge for the review of the Registrar's taxation of the bill of costs of the 2nd defendant.

The plaintiff's claim against the 1st defendant was in respect of a term loan of RM600,000, interest and costs. The claim against the other defendants including the 2nd defendant was on the written guarantee given by them in respect of the repayment of the loan, interest and costs and other related charges. The amount said to be owing when the writ was filed was RM697,451.13.

The Senior Assistant Registrar had given an O. 14 judgment against the 2nd defendant. The appeal against it was allowed and the 2nd defendant was given unconditional leave to defend. One ground for allowing the appeal was that it being an on-demand guarantee a condition precedent to suing was whether there had been a demand and on the facts before the Court whether a demand had been made was found to be a *bona fide* triable issue. The plaintiff thereafter, not unexpectedly, sought leave to withdraw the action as against the 2nd defendant (and the 4th defendant) with liberty to re-file after a fresh demand was made. The Senior Assistant Registrar had refused the application. The appeal by the 2nd defendant against the refusal was allowed. The action as against the 2nd (and 4th defendant) was struck off. Costs of the withdrawn action was ordered to be paid (as taxed) to the 2nd defendant before any new action in respect of the claim against him is filed. It is the taxation pursuant to that order for costs that is the subject of this review.

The review sought is in respect of "getting up" the O. 14 application before the Senior Assistant Registrar (No. 28 at page 4 of the Bill of

Costs, item 26 of Appendix I to O. 59) and "getting up" the appeal from the Registrar's decision (No. 58 at page 7 of the Bill of Costs, item 27 of Appendix I). In respect of the former RM40,000 was billed and RM12,000 was allowed and maintained by the Registrar on review; in respect of the latter RM25,000 was billed and RM8,000 was allowed and maintained on review.

Now, item 1(c) of Appendix 2 to O. 59 provides that in a claim for a debt or liquidated demand, in respect of O. 14 proceedings the successful plaintiff is allowed a fixed basic cost of RM350. There is no similar provision for fixed costs to a defendant who is awarded the costs of an O. 14 application and accordingly the defendant is entitled to have his costs taxed.

Items 26 and 27 of Appendix I to O. 59 and the note thereto are as follows:

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26.	Instructions for trial or hearing of any cause or matter, whatever the mode of trial or hearing.	Discretionary
27.	Instructions for appeal from an interlocutory or final order or judgment.	Discretionary

Note to items 26 and 27:

These items are intended to cover the doing of any work, not otherwise provided for, necessarily or properly done in preparing for a trial, hearing or appeal, or before a settlement of the matters in dispute, including:

(a) taking instructions to sue, defend counterclaim or appeal, or for any pleading, particulars of pleading, affidavit, preliminary act or claim in a reference under O. 56;
(b) considering the facts and law;
(c) attending on and corresponding with client;
(d) interviewing and corresponding with witnesses and potential witnesses and taking proofs of their evidence;
(e) arranging to obtain reports or advice from experts and plans, photographs and models;
(f) making search in public record office and elsewhere for relevant documents;
(g) inspecting any property or place material to the proceedings;
(h) pursuing pleadings, affidavits and other relevant documents;
(i) where the cause or matter does not proceed to trial or hearing, work done in connection with the negotiation of a settlement; and
(j) the general care and conduct of the proceedings.

It used to be suggested that normally a party is not entitled to "getting up" until the case had been set down for trial - see for instance *Chop Yoon Kee Heng v. North Union Insurance Co. Ltd.* [1932] MLJ 67 and see the *State of Selangor v. Kepong Dredging Co. Ltd.* [1932] 1 MLJ 181 where Thorne Ag. CJ said that "getting up" cannot be charged until the solicitors know the facts and law to be debated on and that usually that stage (of knowledge) is not reached until the pleadings are closed. In *Lee Bang v. Nadzri* [1965] 2 MLJ 186 MacIntyre J referred to *Re Kana Moona Syed Abu-Bakar decd.* [1940] MLJ 4 which he pointed had overruled the previously held view. In the Singapore case, *Starlite Ceramic Industry Ltd. v. Hiap Huat Pottery* [1973] 1 MLJ 146 at 149, Choor Singh J in reviewing an item of $700 allowed by the Registrar in respect of "getting up" done before the issue of the writ (the writ was withdrawn soon after it had been filed), after considering a number of Singapore, Malaysian and English judgments concluded that the following general principles emerge from the cases:

(1) A solicitor is entitled to costs of such work as was reasonably necessary for the prosecution or defence of his client's case.
(2) The taxing officer, having regard to the circumstances of each case, must decide whether the work was necessary and proper and the time for doing it had arrived.
(3) The taxing officer has a discretion to allow charges and expenses properly and reasonably incurred in procuring evidence before notice of trial, and even when the evidence is collected, in whole or in part, before the action is commenced. The test is whether the costs incurred before the commencement of the action were necessary and proper for the attainment of justice.
(4) A solicitor is entitled to a "getting up" fee for work done which was necessary and proper even though the case had not been set down for trial.
(5) The Court will not interfere with the decision of the taxing officer upon a mere question of quantum if the taxing officer has exercised his discretion after consideration of all the circumstances and if no question of principle arises. It is only when such discretion has been exercised on some wrong principle or the quantum allowed is obviously wrong that a judge will interfere.

In *Lloyds Bank plc v. Ang Cheng Ho Quarry & Ors.* [1993] 1 MLJ 127 Chong Siew Fai J. ruled

that a defendant who had been sued but had the action against him withdrawn by the plaintiff was entitled to "getting up" even though the action had not been set down for trial. There, the defendant had filed his defence and the plaintiff had taken out an O. 14 and an O. 18 r. 19 application before the action was withdrawn. The claim was for RM2,107,968.28 due on a banking facility. The defendant had raised various defences including illegality invoking the Exchange Control provisions and the omission to obtain the consent of Bank Negara for the granting of the facility and had also invoked the provisions of the Money Lenders Act in asking for the claim to be dismissed. The taxing officer had ordered RM28,000 for getting up. On review the learned judge, after rejecting the contention that at the stage the action had reached the defendant was not entitled to getting up, reduced the amount to RM18,000. It is clear that the learned Judge shared the view of Choor Singh J (Starlite was referred in the judgment) that an amount for "getting up" may be allowed for work done that was necessary and proper even though the case had not been set down for trial.

However the effect, if any, on the costs to be awarded to a successful defendant in an O. 14 application, of the fact that the rules provide fixed costs for a successful plaintiff in an O. 14 application does not appear to have been explored in any reported Malaysian or Singapore judgment apart from *Poh Sum Huat v. Malaysian Banking Ltd*. [1983] 2 MLJ clxxv in which the Deputy Registrar of the Singapore Supreme Court touched upon it. He allowed S$700 for the getting up on a bill presented for taxation on behalf of the defendant where the writ was discontinued after an O. 14 application was filed but before it was heard. Counsel for the plaintiff had pointed out that had the plaintiff been successful in the O. 14 application he would have been entitled to only S$700 fixed costs (that is the amount prescribed by the Singapore Rules Committee in provisions equivalent to Appendix 2 to our O. 59 RHC) and had contended that it follows that the defendant's total costs should also not be more than S$700 and that it follows that for "getting up" the defendant should be allowed an amount somewhat less than S$700. The learned Deputy Registrar was not altogether impressed with the submission. He was not prepared to accept that the amount prescribed as fixed costs for a successful plaintiff in respect of an O. 14 application provided "a ceiling" in respect of costs to be awarded to a defendant who successfully opposed an O. 14 application. However the amount he allowed for "getting up" was only S$700 which seems to suggest that he had not ignored the amount prescribed for a successful plaintiff.

Now, in *Canopee Investment Pte Ltd. & Ors. v. Landmarks Holdings Bhd. & Ors*. [1990] 1 MLJ 292 I had suggested that taxing officers could get some guidance from the Rules Committee's views on the quantum to be awarded. I said,

> A starting point in considering the exercise of discretion by a taxing officer particularly in respect of the item "getting up" could be the fixed scale of costs set out in O. 48 r. 12 of the Subordinate Courts Rules of 1980. The fixed cost in the scale is in proportion to the quantum of the subject matter of the action. The scale is graded up to the maximum of the civil jurisdiction of a Sessions Court which is RM100,000. The cost fixed for advocacy is RM5,450 and for defending or suing RM1,375 to give a total of RM6,825 for a successful party in an action where the subject matter of the action is RM100,000. The grading used after a basic amount at the lower end of the scale is an increase of the amount of costs for suing or defending by RM25 per RM1,000 and for advocacy by RM100 per RM1,000·

I pause to note that there are some qualifications I should have made to what was suggested in Canopee (and did not). The first is that there should be a significant tapering of the rate by which the costs are increased as the value of the subject matter of the claim gets higher. It is, of course, not for me to prescribe or lay down the rates at which the increase is to be computed on. The rate would vary from case to case. At the low end would be the running down and simple goods sold and delivered type of cases and at the other end the not-run-of-the mill and/or complicated cases. However, particularly to graphically, as it were, bring home the point I am making, I would suggest that in the simpler cases, applying the Subordinate Courts Rules scale, where the value of the claim is from, say RM100,001 to RM150,000 the rate of increase should be reduced from RM125 per RM1,000 to say RM60 per RM1,000 and from RM150,001 to say RM1 million the rate should not be more than about RM20 per RM1,000 and thereafter the rate should be reduced to a nominal, say, RM5 to RM10 per RM1,000. In a claim for RM1,000,000 in a simple case where the trial

had lasted 2 or 3 days and where the taxing party is entitled to "getting up" for the trial of the action, the total costs including "getting up" but excluding out of pockets, should not be more than, say, about RM27,000 arrived at as follows:

For the 1st RM100,000 as per the scale	RM 6,826
Next RM50,000 say at RM60 per RM1,000	RM 3,000
Next RM850,000 say at RM20 per RM1,000	RM17,000
Total as rounded off	RM27,000

The next clarification or qualification to Canopee is that it has to be noted that the scale of costs set out in the Subordinate Courts Rules are to meet the whole of the costs excluding out of pockets. Accordingly in arriving at the amount to be allowed for the item "getting up" alone there should be an adjustment made on the prescribed amount.

I would emphasise that the rates and figures suggested here are not necessarily those that the taxing officer should use or apply. They are set out here by way of illustration and to point the direction the taxing officer could take in approaching the taxation of a bill of costs.

One other qualification to Canopee is that there should be a further downward adjustment of the amount to be allowed if the "getting up" involved is not for the full trial. The amount of "getting up" for an O. 14 application where an order for taxation of the costs is made, or for an O. 18 r. 19 application or other interlocutory proceedings, should normally be significantly less than that for the full trial.

I pause to express the hope that if and when Canopee is cited reference to these clarification will not be overlooked.

Coming back to the point in issue in the instant case, in respect of taxing a bill of a defendant who successfully opposed an O. 14 application, the taxing officer may again find it useful to look for guidelines from the view taken by the Rules Committee as expressed in Parts I and II of Appendix 2 to O. 59 of the Rules of High Court and in O. 48 r. 28 of the Subordinate Courts Rules.

Parts I and II of Appendix 2 prescribe fixed costs to be paid in certain circumstances where the claim is for a debt or liquidated demand. Where the plaintiff obtains judgment under O. 14 unconditionally the prescribed basic fixed costs is only RM350. Appendix 2 also provides that in certain circumstances certain comparatively negligible amounts will be allowed in addition to the fixed amount. It is to be noted that this fixed amount *inter alia* covers all the work involved in instituting the proceedings including taking instructions to sue, to settle and settling the writ and the endorsement thereon and/or the statement of claim, taking instructions to file the O. 14 application and taking instructions for and drawing the affidavit in support of the application and could include, as it frequently does, the taking of instructions on any affidavits filed in opposition to the O. 14 application and in respect of any reply thereto. It also covers the consideration of the facts and the law, attending on and corresponding with the client, attending at the hearing of the O. 14 summons and the general care and the whole of the conduct of the proceedings up to and including the O. 14 hearing.

Up to the O. 14 stage solicitors having the conduct of the matter on behalf of the defendant, generally would have put in about as much effort and work as the plaintiff's solicitor had put in - they also have to take instructions on the writ and on the endorsements thereon and on any statement of claim that may have been served. They have to take instructions on the affidavit filed in support of the O. 14 application and for drawing and filing the affidavit in opposition to the application. In "getting up" the case to oppose the O. 14 application they have to consider the facts and the law, they also have to attend on and correspond with their clients, they have to attend at the hearing of the O. 14 summons. They have the general care and conduct of the proceedings up to and including the O. 14 application.

However the responsibility of the solicitors and Counsel for the defendant at the O. 14 stage can, in a manner of speaking, be said to be somewhat greater than that of the plaintiff's legal advisers in that if the plaintiff fails, the matter has not come to an end whereas if the defendant fails that would result in a final judgment against him. But apart from that, as has been seen, the solicitors on both sides of an O. 14 application normally would have put in the same amount of effort and work.

It seems to me that in the circumstances, in assessing the quantum of costs to be awarded to

a successful defendant in an O. 14 application the fact that the Rules Committee have prescribed RM350 as fixed costs for a successful plaintiff applicant cannot be ignored.

As has been pointed out, the defendant's legal advisers can be said to carry a heavier responsibility and no doubt some allowance has to be made for that. Further, bearing in mind that it can be said without any serious fear of contradiction that a revision of the fixed costs and for that matter the whole of the prescribed scale of costs in the RHC 1980 is long overdue and although until such revision takes place the taxing officer is bound by the prescribed amounts, where in items in the Appendix I the amount to be allowed is in the discretion of the taxing officer I think he is entitled to allow for the reduction of the value of money - see **Mallal's** 2nd Edn. at pages 763 and 764 where *Seow Seng Choon v. Yam Kim Chye* [1952] MLJ 244 and *Tham Kwa Chin v. Choong Hoong Sum* [1954] MLJ 161 were referred to in the context of taxation of costs - no doubt in those cases the courts were concerned with the award of damages but the principle is (and the learned author of the 2nd Edn. of **Mallal** thinks it should be applied to costs as well) that the Courts can and should take judicial notice of and allow for the falling of the value of money.

While I agree with Dy. Registrar Khoo Oon Soo in *Poh Sin Huat v. Malayan Banking Ltd.* (supra) that the costs fixed for the successful plaintiff should not be regarded as providing a "ceiling" when costs are being taxed in favour of a successful defendant, I do not think that the defendant should be allowed anything significantly greater than that would have been awarded to the plaintiff if he had been successful in the O. 14 application. For the taxing officer to allow in favour of a successful defendant in an O. 14 application anything substantially greater than the amount fixed by the Rules Committee in respect of a successful plaintiff will be to make nonsense of the amount prescribed as fixed costs by the Rules Committee. However there is an exception to this which has to be and will be explained in analysing O. 59 r. 31(4) of the Rules of High Court.

It is O. 59 r. 31(1) that provides that the scale of costs contained in Appendix I to the order "shall apply to the taxation of all costs incurred in relation to contentious business done ..."

A qualification to that is in O. 59 r. 31(4) which is the rule that brings into play Appendix 2:

> (4) Notwithstanding paragraph (1) costs shall, **unless the Court otherwise orders**, be allowed in the causes to which Appendix 2 to this Order applies in accordance with the provisions of that Appendix
> (emphasis provided).

The phrase "unless the Court otherwise orders" in sub-rule (4) provides an important proviso to the application of Appendix 2. Its effect is to provide the Court with jurisdiction to take a cause to which Appendix 2 normally applies out of the Appendix by ordering otherwise. *Inter alia* the Court may order that the costs be taxed applying the scale of costs in Appendix 1 or the court could invoke O. 59 r. 9(4) and award a gross sum *in lieu* of taxed costs.

Now, having in mind the comparatively small amount of RM350 allowed as fixed costs for a successful plaintiff in an O. 14 application, it seems to me that the Rules Committee must have had in mind the simplest of cases for the application of Appendix 2. This is borne out by the two other cases in respect of which Appendix 2 has application, namely, situations where the defendant without a fight, throws in the towel, as it were, and pays the amount sued for within the time and manner required by the endorsement on the writ or when he allows judgment in default of appearance or in default of defence to be entered.

Where the facts and/or the law is involved and is not simple or straightforward, it does not necessarily mean that O. 14 proceedings are not suitable (see *Supreme Finance (M) Sdn. Bhd. v. Bukit Barat Development Sdn. Bhd.* [1991] 2 CLJ 1394 and *Cow v. Casey* [1949] 1 KB at 481 which was applied in *European Asian Bank v. Punjab & Sind Bank* [1983] 2 All ER 508 and which in turn was followed by the Supreme Court in *Malayan Insurance (M) Sdn. Bhd. v. Asia Hotel Sdn. Bhd.* [1987] 2 MLJ 183) and in that kind of case, if the plaintiff succeeds in obtaining unconditional final judgment Counsel should point out that the Court could and should direct that the computation of costs be taken out of Appendix 2 and order that it be taxed using Appendix I.

And where the defendant succeeds, the taxing officer should not, as I have said earlier, ignore the prescribed fixed costs in Appendix 2 but should also consider whether the Court would

have taken the computation of costs out of Appendix 2 if the plaintiff had succeeded.

In the simpler cases, the successful defendant should not be awarded anything substantially more than the amounts prescribed by Appendix 2 for a successful plaintiff. In other cases it is important that the taxing officer makes a distinction between the getting up relevant to the trial of the action and the getting up relevant to the O. 14 stage of the action. In an O. 14 application the issue is whether there are triable issues and the primary purpose of the application is to decide whether there has to be a trial. Neither the plaintiff nor the defendant is at this stage required to prove his case. Where final judgment is entered for the plaintiff, it is entered summarily, without trial, in consequence of the Court finding that there are no triable issues that merit the matter going to trial. It is not because the plaintiff has proved his case.

Order 48 r. 28 of the Subordinate Courts Rules recognises that the costs where the action is disposed of summarily have to be significantly less than the amount that will be awarded after trial of the action and does so by providing that no costs for advocacy shall he allowed where the plaintiff enters judgment under O. 26A (which has rules similar to the O. 14 rules in the Rules of High Court). Applying the said O. 48 r. 28 to an action for RM100,000 in the Subordinate Courts, we can see in Canopee and in the extract from that judgment that has been quoted here before, that where the plaintiff obtained summary judgment, the costs he would be entitled to would be RM1,375 as opposed to RM6,825 costs after trial. This works out to the plaintiff who obtains summary judgment getting about 20% of what the successful plaintiff or defendant would have obtained as costs after a full trial of the action.

One disturbing aspect of this which cannot be ignored is that what is fixed as costs in the Subordinate Courts Rules appear to be incongruous with the prescribed fixed costs in Appendix 2 to O. 59 of the Rules of High Court - in the example of a RM100,000 claim where summary judgment is obtained by the plaintiff he is awarded, as has been seen, RM1,375 as fixed costs whereas if the summary judgment was in the High Court all he would be entitled to is RM350. In fact even if the O. 14 judgment in the High Court is for, say, RM10 million he only gets RM350 unless the Court orders that his cost be taxed!

The said 20% or $^1/_5$ of full costs for a summary judgment, gleaned from the analysis of the fixed costs prescribed in the Subordinate Courts Rules does provide something firm on which the taxing officer may hang on to in taxing costs ordered to be taxed in respect of O. 14 proceedings.

In the instant case the claim against the 2nd defendant was on his guarantee. The first point taken as providing a triable issue was the contention that the consideration for the guarantee was past consideration. This issue was raised by the defendant taking advantage of a typing error in the statement of claim where the date of the loan agreement (repayment of moneys lent pursuant to it was what was guaranteed by the 2nd defendant) was stated to be 6 January 1985 and the date of the guarantee 6 January 1986. It turned out that in fact both documents were executed on and dated 6 January 1986. The typing error was rectified by an amendment of the statement of claim before the O. 14 application was heard and it followed that the first point was a non-point. It is unlikely that this point was pursued with before the Senior Assistant Registrar - it certainly was not at the hearing of the appeal from the Senior Assistant Registrar's decision.

The 2nd point taken as a triable issue was that because the plaintiff had taken foreclosure proceedings in respect of the charge on lands provided as security it was precluded from suing the 2nd defendant or that in any event the suit was premature. The other point taken was based on the guarantee being an on demand guarantee and whether there has been a due demand was set up as a triable issue. Although the law is well settled on both issues they call for some getting up of the law and of the facts, to enable Counsel to demonstrate to the Court that there are *bona fide* triable issues. That the Court eventually held that the former of the two points did not provide a *bona fide* triable issue does not derogate from the need for the solicitors to have "got up" the point.

In a manner of speaking the law in respect of each of these two points is run of the mill in that each of them has been discussed in any number of reported judgments of the Malaysian Courts. If the plaintiff had succeeded in the O. 14 application and if Counsel had sought for the

costs thereof to be taxed on the ground that the amount of fixed costs would be inadequate he would have, I think, succeeded but only or largely because the prescribed amounts have not been revised since June 1980 and the court should not ignore the fact that the value of money has fallen since 1980.

In my judgment, in respect of the instant case, to allow anything more than about RM2,000 for "getting up" in respect of the O. 14 proceedings is to completely lose sight of what the Rules Committee has prescribed in the appendices to the Rules of High Court and to the Subordinate Courts Rules as its opinion of what should be adequate costs. For the appeal from the Senior Assistant Registrar's decision on the O. 14, while there will be a duplication of the "getting up" the solicitors will have to refresh their minds on the issues and on the facts and the law and will also have to look at it from a perspective that is somewhat different from that of presenting the case to the court of first instance. I would have allowed RM1,500 as "getting up" for the appeal. The learned Registrar does not appear to have made a distinction between the position that obtains at the O. 14 stage and at the trial stage. In any event the amount he has allowed is so obviously wrong and it follows that I have to interfere with his decision.

Accordingly in respect of No. 28 at page 4 of the Bill of Costs, item 26, Appendix 1 to O. 59, I tax off a further RM10,000 to allow only RM2,000 and in respect of No 58 at page 7 of the Bill of Costs, item 27 of Appendix 2, I tax off a further RM6,500 to allow RM1,500. The allocatur or certificate of the Senior Assistant Registrar shall be amended accordingly. As to the costs of the review, I fix it at RM250 to include *inter alia* costs for drawing objections to decisions of Registrar, for drawing, issuing and filing of service of the summons to attend before the Judge for the review, for attending at the hearing of the review and "getting up" the objections and for the review.

KWONG KUM SUN CHAN (M) SDN. BHD.

v.

SELANGOR PROPERTIES BERHAD

HIGH COURT, KUALA LUMPUR
DATO' V.C. GEORGE J.
[SUIT NO. C 2715 OF 1985]
9 JULY 1993

PRACTICE & PROCEDURE: Order 20 r. 5 RHC - Application to amend statement of claim - Addition of new cause of action after expiry of limitation period - Whether permissible - Whether new cause of action distinct from original cause of action.

CONTRACT: Claim for damages - Defendants breaching undertaking to replace existing agreement with two separate agreements - Defendants contending existing agreement rescinded and new agreement entered into between parties - Allegation that plaintiffs breached new agreement - Defendants accepting plaintiffs' repudiation - Plaintiffs denying repudiation - Plaintiffs contending acceptance of alleged repudiation by defendants wrongful.

The plaintiffs' claim was for damages for breach by the defendants of its express undertaking to replace the existing written agreement between the parties in respect of certain building works in Damansara, Kuala Lumpur, with two separate agreements, one for the supply and installation of aluminium products and the other for glass products, containing the same terms as in the existing agreement.

In their statement of defence, the defendants denied the plaintiffs' claim and stated that the original agreement had been rescinded by the parties and that a new agreement had been entered into as evidenced by a letter dated 10 August 1984. The terms and conditions of the new agreement was *inter alia* that the 5mm glass to be supplied, chargeable to the defendants at RM3.60 per sq. ft., had to be of Pilkington origin and had to be imported from the United Kingdom with evidence of such importation to be provided to the defendants. In breach of the new agreement the plaintiffs allegedly unilaterally increased the cost of the glass to RM4 per sq. ft. and refused to provide the defendants with evidence of importation of the glass from the United Kingdom. The defendants allegedly accepted the plaintiffs' breach as repudiating the new agreement. The plaintiffs denied the defendants' allegations and contended that there was